Dissertation

CUSTOMARY COMMERCIAL SANCTIONS

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Introduction

Thanks to social networks and the internet, simple internet users and individuals have become real counter-powers.

Context. Previously, in an already globalised context, the press and the states between them benefited from powers and means of pressure. Indeed, on the one hand, the press, as a fourth power, had the capacity, through its publications, to guide and influence the behaviour of individuals. On the other hand, states could use their diplomatic relations and agreements to force certain states to carry out or not to carry out actions.

However, such powers of influence and actors in the public debate tend now to belong to individuals.

Individuals can now play a major role in customary sanctions, thanks to the increasing use of social media and the internet. This movement of increasing use and importance of the internet is also parallel to a need for transparency and clarity on the part of individuals.

This desire to participate in the public debate and to be an actor in it will result in a free speech on social networks and an important need for transparency.

In order to focus on the subject of this dissertation, we will mainly be interested in customary sanctions resulting from the behaviour of individuals, via social networks and the internet. An individual is a common person, who has no particular prerequisite but corresponds to an average user of social networks and the internet

Definition of usages. In order to approach and define the notion of customary sanctions, it is necessary to define usages. Usages in the sense of repeated and generalised behaviour within a community.

Usages will refer to behaviours which, because of some of their objective and subjective qualities, have normative force. The objective qualities of these behaviours are their determinate, delimited and generalised character, while their subjective qualities include their invocability and legitimacy.

Custom is defined as the binding rule of law attached to usage.[1]

Definition of customary sanctions A sanction is defined as the consequence of an action that has violated a rule, a law, a contract or a rule that is implicitly and socially accepted. A sanction for breaking a rule can take many forms: it can be criminal, civil, administrative, fiscal or contractual.

A customary sanction is a sanction that is suffered, which is neither provided for by the law nor by a contract. Thus, it is a sanction that simply results from a behaviour or a set of behaviours.

As developed throughout this essay, customary sanctions may be financial. For example, in the case where consumers decide to sanction a company for its behaviour by deciding not to consume its products. This refusal to consume would sanction the company's turnover. One of the main customary sanction is also the risk of a tarsnished reputation.

Scope of study

Thus, the aim of this dissertation will be to show how customary sanctions are now emerging, taking into account the new ways of using social networks. The idea is to show that customary sanctions can be more effective and faster than fiscal or pecuniary sanctions imposed by authorities/judges.

This dissertation will intend to explain how customary sanctions are becoming more important and above all how difficult it is to apprehend them as things stand.

This idea will be to wonder how to deal with customary sanctions, where they are originated from, how to deal with them and what is their legal and customary framework.

First, this dissertation will focus on the applications of customary sanctions. (I) In other words, what customary sanctions are we talking about and their origin. Then, the second part of this dissertation will study the defences against customary sanctions (II), meaning what resources can be used against customary sanctions.

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[1] P. Mousseron *Droit des usages,* Institut des usages, 2020-2021

I. The application of Customary Sanctions

Customary sanctions, can come from a variety of behaviours and actions. In this section, we will address some of these forms. We have to keep in mind that these do not reflect the variety of behaviours and actions that can lead to customary sanctions, but these can be considered as the main ones.

This section will deal with three different kinds of behaviours; the boycott (A.), press releases (B.) and internet campaigns (C.) In each part we will identify what behaviour are involved and how to deal with them and provide a legal framework.

A. The use of boycott as a customary sanction

1. *Identification of boycott*

Definition of boycott

Several precisions will help us determine what a boycott is. The term "boycott" originates from Charles C. Boycott[2] who was an Irish landowner at the end of the 19th century, who decided to protect the increase of taxes families living on his lands decided to stop any form of commercial relationship. As a consequence he had to leave his lands.

Boycott is classically defined as the fact of refusing to buy, use or take part in something as a way of protesting[3]. The idea behind boycott is that a small group of persons can have an impact on a company, or a state. Boycott can be similar to embargo or blocus, but the main difference is that it will appear in a particular context, as in the example mentioned above. The idea is that a boycott will remind a party considered as superior that people exist and have power, in a way that it will annihilate the social and geographic distance between them.[4]

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[2] Encyclopaedia Britannica - *Charles Cunningham Boycott*

[3] Oxford Dictionnary

[4] O. Esteves, *Une histoire populaire du boycott,* L'Harmattan, 2005 tome 2, p.169

Different types of boycott

Different types and classifications of boycott exist,[5] the first typology will be the difference between an instrumental boycott and an expressive one. [6] The instrumental one will have a defined purpose; which is redressing a harm. The latter one is to raise public awareness. We will mainly focus on this second definition.

Another distinction is a spontaneous boycott or an organised one. In the first case, the boycotter will join it because he agrees with this movement, in the latter he will be forced to join it, for instance if he belongs to a trade union who is boycotting.

Finally a boycott can be whether direct or indirect. In an indirect boycott, it is not possible to reach directly the target of the boycott, so instead it will target other close organisations for a leverage effect. For instance, in order to boycott a government, it will be chosen to attack companies of this country. A direct boycott is when it is possible and enough to directly target. Different actors can decide to call for a boycott. We will focus on the idea that individual actors, organised in groups or not, will be the main actors of boycott.

A behaviour resulting in a customary sanction

A boycott from a group of individuals may have an impact on a company. An example may help us analyse such a consequence. If we take the boycott against Danone that was led in 2018 in Morocco. During this boycott millions of internet users decided to show their support to this boycott by putting a filter "*Nous boycottons*" on their Facebook profile picture. This boycott was in order to protest against the high prices charged by Danone. As a consequence, these actions of boycott, both on social media, and transposed in practice to a refusal to consume goods produced by Danone or its subsidiaries[7] resulted in important

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[6] This distinction is highlighted by M. Friedman, *Consumers boycotts. Effecting change through the marketplace and the Media,* Routledge, 1999

[7] Sidi Ali, Afriquia and Centrale Danone

sanctions. In that concrete example, this behaviour of boycott resulted in massive losses for Danone [8] and the loss of its status as Morocco's leading milk seller.

2. *Regime of boycott*

Legal basis under French law

There is no reference to boycott in the French penal code. As a consequence, it is pretty hard to frame and sanction such a behaviour. For that reason, and in a particular context of boycott against Israeli products, a circular[9] has been issued in order to try to penalise boycotts. Nevertheless, the mentioned circular only refers to boycott of Israeli products and does not mention any other boycott by or against any other state or company.

In order to identify what legal basis could frame and sanction a boycott we will analyse the purpose behind this circular. The circular refers specifically to the Article 24, paragraph 8 of the 1881 law on the freedom of the press[10] « *proceedings following calls for a boycott of Israeli products"* are *"initiated on the basis of public provocation to discrimination as provided for and punished by Article 24 paragraph 8 of the law of 29 July 1881* ». However call for a boycott cannot be simplified to be considered only as provocations to hatred and violence. Another point is that, they do not target a religion or ethnic as provided by the article 24 but products coming from a particular country: Israel.

This specific circular however was not clear regarding the conditions to sanction such a behaviour, for that reason, the circular mercier came to specify circular which was vague and difficult to apply, by putting a context in indicating that article 24, paragraph 8 of the law of 1881 must be distinguished from article 225-2 of the Penal Code, which represses

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[8] Telquel, "Centrale Danone accuse une perte de 538 millions de dirhams en 2018", march 6th 2019

[9] Circulaire CRIM-AP n° 09-900-A4, *Procédures faisant suite à des appels au boycott des produits israélien*s, Circulaire dit "Alliot Marie", 12 février 2010

[10] Article 24 Paragraph 8: « *"Those who, by one of the means set out in Article 23, provoke discrimination, hatred or violence against a person or group of persons on the grounds of their origin or their membership or non-membership of a particular ethnic group, nation, race or religion, will be punished by one year's imprisonment and a fine of 45,000 euros, or one of these two penalties only. »*

discrimination consisting in particular of "*hindering the normal exercise of any economic activity*"; but it then indicates that the provisions of Article 24, paragraph 8 "*are intended to punish the fact, not of hindering an economic activity, but of inviting by speech or writing to do so*". Thus, by stating that provocation to discrimination on the basis of the membership of one or more persons to a nation leads to the sanctioning of a call for a boycott of Israeli products only if it aims to hinder the normal exercise of an economic activity.

The criterion will be to know whether it hinder the normal exercice of a normal economic activity.

In other words, the question is to know whether call for a boycott is an obstacle to the normal exercise of economic activity or a simple informed choice, a simple contractual freedom of the consumer to consume a particular product rather than another one.

European Court of Human Rights Case Law

Case law is far from being clear on this question. We can nevertheless highlight an important sentence rendered by the European Court of Human Rights. [11] In this case law, the court underlined that the actions and words complained of were political and militant expression and concerned a matter of general interest. For that reason, the Court has repeatedly emphasised that Article 10 §2[12] leaves little room for restrictions on freedom of expression in the area of political discourse or matters of general interest : « *the boycott is primarily a means of expressing protesting opinions. The call for a boycott, which aims at communicating these opinions while calling for specific actions related to them, therefore falls in principle under the protection of Article 10 of the Convention* ».[13] Because of its

[11] European Court of Human Rights, 11 june 2020, Baldassi e.a. c/ France, n° 15271/16

[12] Article 10 §2 of the European convention on Human Rights: « the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. »

[13] European Court of Human Rights, 11 june 2020, Baldassi e.a. c/ France, n° 15271/16 - §63

nature, political speech is often virulent and controversial. However, it remains in the public interest unless it degenerates into a call for violence, hatred or intolerance.

Finally, a general remark that can be made is that it is difficult to sanction a boycott movement itself, it has to be on other grounds, and usually individuals taking part into this movement will be sanctioned for their actions, which are applications of their idea of boycott.[14] The idea is that only the consequences of such conduct will be punished.[15]

B. The use of press releases as a customary sanction

Another practice that could lead to customary sanctions are press releases. First, it is important to identify (1) what they are, in order to be able to identify a legal regime and framework. (2)

1. Description of press releases as a customary sanctions

What is a press release

A press release is a public statement given by a company or organisation to journalists. [16] A press release can be used as a customary sanction in the way that it will inform the community to denounce new, important information that the public should be aware of. After a press release, customary sanctions will follow from the actions taken by the receivers of that release, who may act differently in the light of new information of which they are now aware.

[14] For instance : *La Ronce* is an organisation which aims to destroy supermarket sugar, soda or any other goods in order to denounce transnational companies owning these brands, which are presumed to destroy living things. The movement itself is hard to convict, but it will be easier to convict activists for destruction of goods.

[15] M. Drillech, *Le boycott : histoire, actualité, perspectives*, éd. Fyp, 2011, pp. 40-43

[16] Cambridge Dictionary - https://dictionary.cambridge.org/fr/dictionnaire/anglais/press-release

Rules to make a press release effective

In order to make a press release effective and useful, some rules coming from the practice have to be respected. Knowing the right way to issue a press release is almost as important as the information in the release itself. The first advice would be to [17] be sure that the information of the press release is worthy, meaning new and interesting. Then on a practical form, the press releases should have catchy titles, and be concise.

Effect of a press release

Regarding the effect of a press release and why we have to consider them as sources of customary sanctions, as previously mentioned press releases can have an impact, because of the power and influence of the entity that will issue it. Indeed, it will influence individuals to act and behave in a certain way, their purpose is to change or influence the behaviour of their audience by gaining their support. These behaviours will likely result in a sanction. For instance, a press release from a powerful non-governmental organisation will possibly convince people to not consume goods produced from a certain company. [18] Again in this example individuals will decide do not buy to a certain company because of an information revealed through the press release. The customary sanctions will be losses for the company.

2. *Regime of press releases*

Legal value of a press release

First of all, an important question that has to be answered is the legal value of a press release. It seems that press releases, even if they are not strictly considered as creating any

[17] J. Murray, « How to write an effective press release », theguardian.com, 16 june 2015

[18] In this example, we can combined both the boycott and press releases's effets as customary sanctions

legal right or obligation for anyone, are considered as soft law acts.[19] Nevertheless, in this case it was a press release from the French Autorité des marchés financiers, it was considered as acts of communication and position-taking. For that reason, by virtue of the publicity and the quality of their author, it has a strong influence on market participants, even if they are under no obligation to follow the position of these public authorities from a legal point of view.

However, the importance of soft law in the new modes of action of public bodies, as highlighted in the Conseil d'Etat's 2013 study.[20] Without actually creating a legal obligation or granting new rights to users, the administration can use communication tools to influence or dissuade actors, and can issue positions or recommendations that are not binding but will, in fact, be listened to and acted upon.

If we seen such importance from press releases from administrative organs, we can easily understand and imagine the growing importance that will have press releases edited from companies or private groups.

Legal responsibility of the author of a press release

After a press release, that will likely impact a company for instance, we can wonder if this company can take actions against the author of the press release. First, in order to take such actions, it is necessary to identify who can be held responsible for the press release.

[19] Conseil d'État, Assemblée, 21/03/2016, Décision n° 368082, Publié au recueil Lebon

[20] Conseil d'État - Etude annuelle 2013 : Le droit souple

A general principle of press law that the responsible of a communication will be the publication director.[21] In case where it is not possible to identify this publication director, a cascading liability is used.[22] According to the structure that wrote the press release the director of the publication will be different. For instance, the legal regime of the company will have an impact on the publication director. [23]

Legal responsibility for audiovisual communication

The same principle applies for audiovisual communication. According to paragraph 1 of Article 93-2 of Law No. 82-652 of 29 July 1982 on audiovisual communication, "All electronic public communication services are required to have a publication director. ".

This notion of publication director is also found when it comes to the traditional "legal notices" on websites. Indeed, the publisher of a website must make a certain amount of information available to the public: identity of the publisher, the publication director and the host.[24]

According to Article 93-2 of the law of 29 July 1982, "When the service is provided by a legal person, the publication director is the chairman of the management board or the board

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[21] Article 42 of the law for the freedom of the press, 29 july 1881 : « The following shall be liable, as principal perpetrators of the penalties for crimes and offences committed through the press, in the following order
1° The directors of publications or publishers, whatever their profession or name, and, in the cases provided for in the second paragraph of Article 6, the co-managers of the publication;
2° Failing them, the authors;
3° Failing the authors, the printers;
4° In the absence of printers, the sellers, distributors and posters.
In the cases provided for in the second paragraph of Article 6, the subsidiary liability of the persons referred to in paragraphs 2°, 3° and 4° of this Article shall apply as if there were no publication director, where, contrary to the provisions of this law, a joint publication director has not been appointed. »

[22] see 20 above

[23] Article 6 of the law for the freedom of the press, 29 july 1881 : « Article 6
Every press publication must have a publication director.

Where a natural person is the owner or leaseholder-manager of a publishing company within the meaning of Law No. 86-897 of 1 August 1986 reforming the legal regime of the press or holds a majority of the capital or voting rights, that person shall be the publication director. In other cases, the publication director is the legal representative of the publishing company. However, in sociétés anonymes governed by Articles L. 225-57 to L. 225-93 of the Commercial Code, the publication director shall be the chairman of the management board or the sole managing director. »

[24] Article 6, III of the law of 21 June 2004 - Loi la confiance dans l'économie numérique

of directors, the manager or the legal representative, depending on the form of the legal person. When the service is provided by a natural person, the publication director is that natural person » .[25]

Legal notions framing press releases

Having determined what liability can be incurred, the question arises as to the legal basis on which this can be done. One legal that could limit a press release is defamation: defined as « *Any allegation or imputation of a fact which is prejudicial to the honor or consideration of the person or body to which the fact is imputed is defamation. The direct publication or reproduction of this allegation or imputation is punishable, even if it is made in dubious form or if it is directed at a person or body not expressly named, but whose identification is made possible by the terms of the incriminating speeches, shouts, threats, writings or printed matter, placards or posters.* »[26]

In order to incur liability of the publication director of a press release, it will be necessary to provide proof that there is a prejudice for the honor or consideration of the party targeted.

Another possibility that could frame press releases are slanderous denunciation. According to Article 226-10 of the Penal Code, slanderous denunciation is the denunciation of a fact based on a lie to a person with the power to act on it or to a person who can act on it. The fact reported must be of such a nature as to lead to a judicial, disciplinary or administrative sanction.

Freedom of the press

On the other side we can find the principle of freedom of press, Article 11 of the French Declaration of the Rights of Man and of the Citizen of 1789 states: "The free communication of thoughts and opinions is one of the most precious rights of Man: every Citizen may therefore speak, write, and print freely, except for the abuse of this freedom in the cases

[25] « Qui peut être désigné directeur de la publication ? », mathias-avocats.fr March 18th 2019

[26] Article 29 of the law for the freedom of the press, July 29th 1881

determined by the Law. » Article 19 of the Universal Declaration of Human Rights also provides for the protection of press freedom and article 10 of European Court of Human Rights (ECHR) as a component of freedom of expression (Article 10 of the European Convention on Human Rights).

Case law also reminds often how press as an important role, for instance « The Court has emphasised on numerous occasions the essential role played by the press in a democratic society. It stated that while the press must not cross certain boundaries, particularly with regard to the reputation and rights of others, it has a responsibility to communicate, in accordance with its duties and responsibilities, information and ideas on all matters of public interest. »[27]

We understand the balance that has to be found by the legislator in order to protect this freedom, but on the other hand to make sure that honor and reputation of people are respected, even in press releases.

C. The use of internet campaigns as a customary sanction

Finally, the last behaviour that leads in customary sanctions that we will study are internet campaigns. We will first address a description of what are these press campaigns and how they can result in customary sanctions (1), and then what legal regime can applies (2).

1. Description of internet campaigns as customary sanctions

Different use of different social medias

For the purpose of this analysis we will focus on the main social medias : Facebook, Twitter, Instagram and more recently TikTok. Depending on which social media is used, the campaigns and behaviours of the users will be different. In order to see the differences between these different social medias, we will deal with them starting by the least agressive one to the most.

[27] European Court of Human Rights 14 fév 2008, July et SARL Libération/France, 20893/03 § 63

First of all, Tik Tok is the most recent one, it is mainly used for unimportant topics. Nevertheless we can see appears some trends that can be related to campaigns, but it is usually minor, and the users are mostly young users (teenagers).

Instagram is now mainly used for influencers, meaning people that have a community and will use it to be an influent people.

Facebook, is still the most used one, maybe not the most trendy one now, but still a social media with a strong community commitment.

The gradation ends with Twitter. It is identified as the most searing one, thanks to a really low censorship policy and the fact that it is very easy to directly address brands or people.

According to the social media used, the behaviours and practice will differ. One thing that is still common to all of them, maybe in different levels, is that it is efficient for customary sanctions because it is easily accessible, easy, free and with no obstructions to access.

Example of behaviour on social medias

A behaviour that we can identify on social medias is the phenomena of « name and shame ». « Name and shame » is to reveal the identity of a person or organisation guilty of illegal or unacceptable behaviour in order to embarrass them into not repeating the offence.[28] In other words it aims to publicly say that a person, a group or a business has done something considered as « *wrong* » for the public opinion or a part of it.

This action will in practice be the publication via social networks of lists of people,[29] or names of individual people who are accused of an action. This can also be done in the case of a company, a group of companies[30] or even politicians.[31]

[28] Collins Dictionary

[29] For instance with the movement #metoo launched in 2017, on social medias, which was a movement against sexual harassment which aims to denounce allegations of sex crimes.

[30] As mentionned in Part I. A. : the boycott against Danone in Morocco was done through : #nousboycottons

[31] In 2020 in France, the Ministry of Labour website displays a list of companies with more than 1,000 employees, specifying their score in terms of gender equality at work

In a practical point of view, hashtags can be used to easily find and classify these publications in order to create a mass effect. The same hashtag will be used for the same topic and within the same campaign.

Behaviour Resulting in a Customary sanction

The idea behind such campaigns is to raise awareness of a situation that is global, important and affects many people.

The aim is to shame the perpetrator of the action and hope for a reaction. If this is not the case, such a movement will have the merit of alerting public opinion, the government of a country and even the courts.

Consequently, the sanctions of such a movement may be diverse, for example in the case of a company's name and shame, consumers may choose to turn away from the brand's products, thus affecting its profits. In the case of denunciations of an individual's behaviour, the consequences could be the loss of his or her job, or the loss of a contract. Another risk will be the impact on reputation and e-reputation.

2. *Regime of internet campaigns*

Three relevant legal aspects are linked to internet campaigns.

Legal framework of social Media

A social media is defined as « online communication platforms that allow any internet user to join or create networks of users with similar opinions and or common interests. »[32]

These social medias meet some characteristics. Users are invited to provide personal data to give a description or "profile". They also provide tools for users to upload their own content, such as photos, reviews or comments, music, videos or links to other sites. Finally, Social

[32] Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995

networks operate through the use of tools that provide a list of contacts for each user with the possibility of interaction. "[33]

Regarding the liability on social medias, we can find, four specific liability regimes incumbent on internet actors: one of the host or storage provider, that of the internet access provider, that of the online merchant and finally that of the subscriber.[34]

The host is defined as *the natural or legal persons who ensure, even free of charge, the availability to the public by online public communication services, the storage of signals, writings, images, sounds or messages of any kind provided by recipients of these services.*

As they are recognised as hosts, social medias are subject to reduced liability. This means that those responsible for social networks cannot be held civilly liable if they were unaware of the unlawful nature of the message posted by an internet user or if they acted promptly to remove the content published as soon as they became aware of its unlawful nature.
With regard to particularly serious offences, the host must fulfill several obligations. In particular, it must set up a system enabling users to report this type of content and it must then, as soon as it is informed, report these offences to the competent authorities.[35]

Liability when responding to internet campaigns

Another question that can arose is regarding the liability of a company, that thanks to its communication team will answer the internet campaign through their social network accounts.

Regarding the responsibility of the person in charge of communication on social medias, a person or a communication team we will distinguish whether this is an externalised service or not. If a company is using an intermediary communication agency to take care of its social

[33] Opinion 5/2009 on online social networks adopted on June 12th 2009.

[34] Law n° 2004-575 of June 21s 2004 for confidence in the digital economy

[35] P. Lingibé, « Quelles responsabilités sur les réseaux sociaux ? » village-justice.com , July 16th 2018

networks, responsibility for communication is a contractual one, it is an obligation of means, whereby the agency undertakes to do everything in its power to provide its client with the communication that best meets its expectations. However, the contract can specify an obligation of result. [36]

If the main company is not satisfied by the communication provided by the communication team, they will be held contractually liable.

Regarding the liability of a company for the content posted on their social media in the name and on behalf of the company the content will engage the responsibility of the company. Indeed we can consider that people in the company in charge of the communication on social medias, such as the communication department are doing in because they are enabled by the company to do so.

A necessary balance between freedoms and protection of personal interests

These social networks can be seen as the *pyres of our modern times*[37]. If sanctions are deserved, the should be pronounced by institutions designed to apply them, constitutionally established, and it is difficult to accept that they should be so blithely bypassed.
Another aspect that can be criticised is the lack of proportionality. The collective takes precedence over the individual, notably under the guise of a justification for a debate of general interest.

Finally, it concerns the idea of justice itself, courts are no longer called upon to deal directly with the fact brought to the attention of the public, in order to judge it themselves, and to sanction it insofar as it is contrary to the law, or insofar as it is a sufficiently pronounced civil fault to obtain compensation. This "jurisdictional" mission is now in the hands of the social networks and the popular justice movement.

[36] Court de Cassation, Chambre Commerciale, June 24th 1986, 84-15058

[37] Y. Mayaud, « Le « name and shame », bûcher des temps modernes », leclubdesjuristes.com, april 25th 2021

Throughout the first part, it has been shown that there is an upheaval in individual behaviour, and the consequences that may follow: customary sanctions.

In view of the difficulty of providing a legal framework for such behaviour, the law may be one step behind the customs of the internet and social media, which lead to customary sanctions for companies.

If we have seen that legal regimes are sometimes difficult to find to frame behaviour, we may ask whether there are more general defences against customary sanctions.

II. The defences against Customary Sanctions

Defences against customary sanctions will aim to minimise the effects of these sanctions. They will also attempt to repair the damage caused by these sanctions, both in terms of reputation and financial damage. Finally, they will also seek to hold those responsible for the sanctions accountable. These defenses can be statutory (A), or customary ones (B).

A. Statutory defence

When thinking of a statutory defense against customary sanctions, different steps have to be taken into account, first of all, we have to identify the applicable law (1), and then once it is done, it will be possible to identify different grounds in order to sanction customary sanctions (2).

1. Designation of the applicable law

Determination of the applicable law

One of the main issues is that customary sanctions usually come from, (as seen in part I.) uses of social medias, the internet in a worldwide scale. The issue will be then to determine

which law is applicable and which base principle should apply in order to designate the applicable law.

In the example of a name and shame campaign, or boycott conducted via social networks, the question will arise as to the applicable law. Indeed, such movements will involve both the law of the social network company's headquarters and that of the network user.

This problem will be solved in a different way depending on the national law taken into account, in our case it will be French law.

Application of French law

According to French law, content published on the internet can be prosecuted by the French courts: if it can be consulted in France,[38] in the French language, or if it is intended for the French public, or if it affects the interests of a person living in France.[39]: This is the case even if the author is not in France and even if the site where the content is found is not a French site.

Under French law, jurisdictional clauses which are not between two professionals are unfair clauses. [40] For that reason, jurisdictional clauses contained in general terms and conditions of use, of Facebook for example, are unenforceable against users in France.[41] The reasoning is that the contract with Facebook is a consumer contract subject to the legislation on unfair terms, so that the user must have the choice to bring the case before the court of his place of residence. The jurisdiction clause in favour of the Californian courts contained in the contract has the effect of creating, to the detriment of the non-professional or the consumer, a

[38] Court of Justice of the European Union, 25 October 2011 "eDate Advertising & Martinez"

[39] « Responsabilité des contenus publiés sur internet : quelles sont les règles » - Direction de l'information légale et administrative, service public.fr, 03 décembre 2020

[40] Article L132-1 and Article R 132-2 of the French Code de la consommation: unfair terms are

[41] Paris Court of Appeal, - Chamber 2, judgment of 12 February 2016

significant imbalance between the rights and obligations of the parties to the contract and of creating a serious obstacle for a French user to exercise his legal action.

2. Application of the designated law

Difficulties as to the designated law

As seen previously customary sanctions resulting from different behaviours such as boycotts, press releases and internet campaigns are difficult to frame and it is therefore difficult to find a legal basis on which to sanction them.[42]

Positive law seems to be deficient and does not seem to take into account this type of actions. As a result, close provisions will have to be applied, but they do not fully correspond to the given situations.

Another problem is that actions giving rise to customary sanctions touch on sensitive issues. Indeed, the call for a boycott or internet campaigns involve notions of freedom of expression and freedom of the press. As a result, the legal sanction of such behaviour will always be delicate, as it must be balanced against certain freedoms.

For example, in the case of an internet campaign, the court refused to sanction participants for defamation, considering that "*the pronouncement of a sentence, even if only civil, would be a disproportionate infringement of freedom of expression and would be likely to have a dissuasive effect on the exercise of this freedom*".[43] Since simply condemning such behaviour would be disproportionate, this would therefore be very difficult on any other legal basis.

[42] Part I. A. 2. B. 2 and C. 2.

[43] Court of Appeal of Paris, Pole 2 - Chamber 7, 31 March 2021

Application of disparagement

While we have already addressed the possibility that such actions may be punished for defamation and slanderous denunciation, there is the legitimate question of disparagement. Disparagement is the public discrediting of a person or a company.
Disparagement, or commercial disparagement It is a wrongful use of the freedom of expression, within the meaning of Article 1240 of the Civil Code, when the author of the disparagement has the intention to harm and cause damage to others. Disparagement is an unfair competition practice sanctioned by the Civil Code. It consists of an employee, a partner or a competitor discrediting the company or another competitor by spreading malicious information about it or its products or services

Moreover, Disparagement is distinct from defamation in that it emanates from an economic actor who seeks to benefit from a competitive advantage by penalising his competitor.[44]

Thus, insofar as the behaviour used comes from individuals who are not seeking to gain a competitive advantage, such a basis would not be able to cover the examples mentioned above.

Tort or contract

Another important point concerns the legal actions to be taken to avoid suffering customary sanctions. On the one hand, the first reflex of a company or an entity under pressure is to ask the host to remove the problematic messages or contents against it. The website host must do everything in its power to remove such comments when it becomes aware of them.

If it is an online newspaper, the director of the publication will be the one to be prosecuted.

[44] Autorité de la Concurrence, Decision No. 09-D-14 of 25 March 2009

In the case of social media, it will be the author of the publication himself. The victim can only sue a natural person and not a legal person (a trade union, a company, etc.). This is the case even if the publication in question is published in the name of the company or trade union.

Both, the criminal liability of the author of the remarks as well as his civil liability may be engaged.

A need for appropriate legislation

As shown above, it can be complex to regulate internet campaigning, boycotting or press releases. They are protected in the name of freedom of expression, freedom of the press or in the name of the public interest, however, an adapted legal framework seems necessary for some of the doctrine.

In the absence of a conviction in the "*Balance ton porc*" case, it could be seen as a "licence to defame".[45]

Moreover, the general interest takes precedence over particular interests, and if we move the cursor slightly towards greater severity in the requirement of a factual basis, we run the risk of breaking a dynamic that contributes to social progress. There is a "communicating vessels" phenomenon whereby the higher the general interest cursor goes, the lower the other cursors go. With regard to social networks and their abuses, it is clear that the law is deeply unsuited to dealing with this mass phenomenon, both in terms of its content and in terms of society's response mechanisms. The judicial reaction, when there is one, is too late and too costly.

Press law was not designed to respond to the horizontality of such a phenomenon. It is adapting as best it can, but it should not be asked to regulate more than a few isolated specific situations.[46]

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[45] M. Burguburu, « La consécration d'un « permis de diffamer » ? », blog.leclubdesjuristes.com, 25 april 2021

46 C. Bigot, « , Intérêt général contre intérêts particuliers : comment appréhender la libération collective de la parole ?, blog.leclubdesjuristes.com, 25 april 2021

The general answer, which would make it possible to regulate speech on social networks, has not yet been found, and the place of freedom of expression with regard to so-called citizens' speech has been solemnly recalled by the French Conseil constitutionnel. [47]

Moreover, appropriate legislation would also avoid unpredictability. Indeed, as we have already seen, such phenomena are governed by concepts derived from the case law of the European Court of Human Rights. These include, for example, the general interest and proportionality. However, these jurisprudential concepts are also characterised by their unpredictability. They allow the judge to shape a judicial response according to his or her own moral conceptions, or vision of society. It would therefore be desirable to limit the arbitrariness of the judge, particularly as it is a question of setting the cursor on a fundamental freedom.[48]

B. Customary defences

As we saw so far, it is difficult to find statutory defences in order to avoid customary sanctions. Therefore, the usefulness of customary defences needs to be questioned. A customary defence can be defined as a means of defence, to react in our case to customary sanctions suffered. These defences are customary because they are neither conventionally nor legally established. They are means that are put in place in practice and have become customary through repetitions.

Customary defences seem more relevant and efficient since they will apply to customary sanctions too. This way, it will be easier for them to fit to the given situation.

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47 Décision du conseil constitutionnel n° 2020-801 DC du 18 juin 2020 de non conformité partielle : Loi visant à lutter contre les contenus haineux sur internet

48 C. Bigot, « , Intérêt général contre intérêts particuliers : comment appréhender la libération collective de la parole ?, blog.leclubdesjuristes.com, 25 april 2021

In order to understand these means, we will mention three of them: press releases (1), campaigns through social media (2) and the desire to regain the trust of consumers or users (3).

1. *Use of press releases*

The first customary defence is the use of press releases. If press releases can be the origin of customary sanctions, they can be a mean of defence as well. They can be used as a counter-power and be used to "redeem" oneself.

The purpose of a press release will be to clarify and take a position on the issue that is causing the problem.The use of a press release will generally be one of the first means used by a company to respond to attacks or social movements. Such a method makes it possible to position oneself and provide a clear response.

Example of the Danone's press release

In the example mentioned earlier of the boycott against Danone in Morocco,[49] Centrale Danone, the Moroccan entity reacted only a few days after the call for a boycott on social networks.

As the reaction shows, a press release aims to take a stand but also to try to limit the social movements underway, in order to limit the customary sanctions to come. (In this example, the drop in consumption of Danone products, subsequently leading to a drop in turnover).

Danone's first reaction was to apologise to consumers: "*Centrale Danone apologises to all citizens who felt offended by such comments, which do not reflect the company's position. Centrale Danone expresses its deep respect to all Moroccan consumers and tries its best to listen and understand them.* "

Nevertheless, it was also a question of taking a position on the criticisms that were made, and which were at the origin of the boycott: prices that were considered too high.

[49] See Part I A.

"*Faced with the questions expressed by consumers, Centrale Danone wishes to make the following clarifications:*

Centrale Danone has not increased the price of milk. Aware of the importance of milk in the diet and its health benefits, Centrale Danone has kept the price of milk unchanged since July 2013, despite a continuous rise in its costs.

Centrale Danone will continue to act strongly to satisfy its consumers by serving 78,000 points of sale on a daily basis and by animating an agricultural ecosystem composed of 120,000 farmers representing 600,000 people in the rural world. «

This example helps to understand the purpose and the role of such customary defense. Usually, press releases will be the first one to come up, but not the last. It will more likely be the first step in a response strategy.

2. Campaign through social medias

Another customary defence that can be used by a company is campaign through social medias. It will be more relevant and effective to react on the same networks on which one was bashing because the goal is to win back public opinion, convince those same people who were reluctant and actor of the criticism campaign.

A general important remark to make is that, if we saw previously that Twitter is a really virulent social media, on which users are usually really direct and violent towards companies, this remark is verified the other way around. The weakness of Twitter is also a strength; it allows companies to interact directly with consumers.

If the purpose of a press release is to take a stand and react quickly, internet campaigns are generally more structured. Indeed, they will help to rebuild a new image with consumers.

Example of the Danone's internet campaign

After the boycott campaign, it was important for Danone to respond on social networks. For this, the hashtag #centraledanonerépond was set up. [50] This hashtag was accompanied by several steps and publications from the company, such as a video from the CEO. The idea of such a campaign is to occupy social networks, to use them without it working against the company. Instead of coming across the boycott hashtag, Internet users can come across Danone's response campaign. The idea of such a campaign is to occupy social networks, to use them without it working against the company.

The link between a brand and its buyers is very easy to break, much more difficult and long to rebuild. This requires better communication and accessibility.[51]

3. Regaining trust and use of transparency

Finally the last customary defense that can be used by a company victim of customary sanctions is the use of transparency and regain trust of their consumers. This is a theoretical idea, that can be implemented thanks to the two previews techniques mentioned : press releases and internet campaigns.

Use of transparency

However other means can be used, for instance in the case of Danone, transparency regarding the origin of milk used was implemented in order to justify its price. Emmanuel

[50] E. Maussion, « Le boycott de Danone au Maroc, une bonne leçon sur la gestion de crise » slate.fr , january 8th 2019

Faber, CEO, has made three commitments: transparency on costs and quality at all times, not to make any profit on its Centrale fresh pasteurised milk and to trust all Centrale fresh pasteurised milk stakeholders to find the right and fair price.

The idea was to explain the process of making its milk, from collection to sale to the final consumer, to justify the high prices that were at the origin of the boycott.[52]

The idea behind this technique will be to justify and explain to the consumers and public the facts that had been criticised .

Regaining consumer's trust

Finally, the last aspect to be taken into account as a customary defence is to regain the trust of the consumer, or of people who feel wronged. (depending on the situation). The idea will be to give power back to the consumer, to show that he or she is important and that his or her opinion matters to the person who is the victim of customary sanctions.

In order to understand what form this can take we can analyse Danone's actions in this sense.

A communication campaign called "Ntwaslo w Nwaslo" ("Let's dialogue to move forward ») [53] has been set up by the Group. The aim is to find " a fair price, a just price, which will make the price of fresh pasteurised milk from Central in Morocco more accessible and, at the same time, protect the income of farmer".

In addition, an "understanding phase" has been set up to "support local actors in building new business models with more inclusive vocations".

In order to implement this project, Danone has mobilised 1,000 of its employees who will "go out into the field to meet consumers and grocers to listen to them and discuss their proposals". Five public consultations and a dedicated platform were also set up with the aim of "explaining the process, summarising the exchanges and giving the opportunity to all

[52] « Après le boycott, Centrale Danone veut faire dans la transparence », telquel.ma , september 1st 2018

[53] « Centrale Danone lance une campagne de consultation pour ses prix » telquel.ma, august 1st 2018

those who want to participate and express themselves on the proposals put forward for debate".

The proposals were then studied within the framework of the new fresh pasteurised milk model. The aim of all these actions was to recreate a relationship of trust with consumers, in order to prevent such waves of boycott leading to sanctions from reappearing in the future.

In order to be efficient, several of these methods has to be combined.

Conclusion

As has been shown in this dissertation, customary sanctions are concepts that are still too little understood legally. As a result, it is difficult to provide a framework for them and, if necessary, to sanction the perpetrators of such behaviour.

However, customary defences seem to be better suited to deal with such behaviour. To the extent that these customary responses will be better suited to its sanctions, which are also customary.

A better framework and understanding of customary sanctions could then take place through the use of customary means of defence. For this to happen, it would be desirable for usages to be better taken into account.

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